IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No.856 of 1980
WITH
FIRST APPEAL No.857 of 1980
WITH
FIRST APPEAL No.44 of 1981
WITH
FIRST APPEAL No.45 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ASHA TEXTILES

Versus

BANK OF BARODA,M.O. MANDVI BARODA,B.O.AT SURAT BHAGATALA

Appearance:

1. First Appeal Nos. 856 & 857 of 1980
   MR DIPEN SHAH for MR KC SHAH for Appellant No. 1
   MR AC GANDHI for Respondent Nos. 1-2
   ..... for Respondent No. 3-4
2. First Appeal Nos. 44 & 45 of 1981
   MRS KETTY A MEHTA for Appellant No. 1
   MR AC GANDHI for Respondent No. 1
   RULE SERVED for Respondent Nos. 2-4

CORAM : MR.JUSTICE M.C.PATEL

Date of decision: 05/03/2003

COMMON ORAL JUDGEMENT

1. These four appeals arise out of the common judgement passed by the learned Civil Judge (S.D.), Surat in Special Civil Suit Nos.162 of 1976 and 163 of 1976 whereby the learned Judge decreed the said suits filed by the respondent No.1 - Bank of Baroda against the appellants and other respondents who were the defendants.

2. The facts leading to these appeals are as follows.

A firm known as Ashok Silk Fabrics (defendant No.1 in each suit) had an account with the Bank of Baroda, Sagrampura Branch, Surat. According to the bank it was a partnership firm and defendant Nos.2 and 3 were its partners. M/s. Asha Textiles (the appellant in First Appeal No.856 of 1980 and the defendant No.4 in Special Civil Suit No.162 of 1976) had an account with the same bank at the Textile Market Branch, Surat. Similarly, another firm M/s. A. Ketankumar & Company (the appellant in First Appeal No.857 of 1980 and the defendant No.4 in the Special Civil Suit No.163 of 1976) had an account with the same bank at the Textile Market Branch, Surat. It is not in dispute that the defendant No.1 drew two cheques on 24-09-1973 for Rs.10,500/=, one in favour of M/s. Asha Textiles and the other in favour of M/s. A. Ketankumar & Company. The said firms paid the cheques into their accounts at the Textile Market Branch. According to the bank, the cheques were sent for collection to its Sagrampura Branch where the defendant No.1 had its account. According to the procedure of the bank, if the cheques are not returned during the fixed period from the branch, then the amount which was given to the parties as credit is allowed to be withdrawn from the account of the parties. Accordingly the amounts of the said cheques were credited in the accounts of the said two firms and they also had withdrawn the said amount. However, when internal branch accounts were sent to Textile Market Branch, an inquiry was held and it was found that the cheques had never reached Sagrampura Branch on that date and that they had been lost in transit. As a result, the amounts of those cheques were not debited in the account of the defendant No.1 at Sagrampura Branch. Thereafter the defendant Nos.2 and 3, who were alleged partners of the defendant No.1, had discontinued the transactions and also the account of defendant No.1 with the plaintiff. The bank called upon the defendants to pay the amount of the said cheques and on failure to do so the bank filed the said two suits claiming an amount of Rs.10,500/= and Rs.4,357=70 as

interest @ 15% in each suit.

3. The defendant No.2, who was sued as a partner of the defendant No.1, resisted the suits by filling his written statement. He raised various contentions. However, his main defence was that he was not a partner of defendant No.1 and that he had never done any transaction with the bank as a partner of the defendant No.1. According to him, he knew only Urdu and Sindhi languages and could not read letters in English as well as in Gujarati. He said that he was doing business of dalali in cloth and that he was also carrying on business of his own. The defendant No.3 was doing his work for his own business as well as for his business as dalali at Surat and that the defendant No.3 was taking his signature on Gujarat and English papers for the purpose of the said business saying that his signature was required for the said purpose. He averred that he had not opened any account in Sagrampura Branch as a partner of the defendant No.1

4. The defendant No.4 in their written statement contended that there was no cause of action against them. They said if the cheques were not sent in time from one branch to another and if they were not credited and mistake was committed, then they were not responsible for it. They denied various other averments made in the plaint. The defendant Nos.1 and 3 did not file any written statement.

5. The learned trial Judge after recording oral and documentary evidence led by the parties negatived the defence of the defendant No.2 that he was not a partner of defendant No.1. He also held that the defendant No.4 was liable to pay the said amount as a surety of defendant No.1. In view of the said findings recorded by the learned Judge, he decreed the suits against all the defendants.

6. The defendant No.2, who had contended that he was not a partner of defendant No.1, has filed First Appeal Nos.44 of 1981 and 45 of 1981 while the defendant No.4, who contended that it was not responsible for the mistake committed by the bank and was not liable to pay the amount, has filed First Appeal Nos.856 of 1980 and 857 of 1980.

7. I have heard the learned advocate Mr.Dipen Shah, who appears for Mr.K.C.Shah for the appellants in First Appeal Nos.856 and 857 of 1980 and the learned advocate Mrs. Ketty M. Mehta, who appears for the appellant in

8. As stated earlier, it is not in dispute that the defendant No.1 had drawn two cheques dated 24-09-1973 each for Rs.10,500/= in favour of the defendant No.4 in each suit and that the defendant No.4 had deposited the said cheques in his account at Textile Market Branch on the said date. Since the cheques were drawn on another branch of the same bank they had to be sent for collection. As per the rule, if the advice is not returned from the bank to which those cheques were sent for collection, then the party is allowed to withdraw the amount from his account. Considerable evidence was produced to show that the cheques had been sent from Textile Market Branch to Sagrampura Branch. It is not in dispute that the advice was not returned from the Sagrampura Branch and hence, the defendant No.4 was allowed to withdraw the amount from his account. The bank's case is that though the cheques were forwarded to Sagrampura Branch, they never reached there and hence the only inference was that they had been lost in transit. That may be so but it is not even the case of the bank and there is nothing to show that the defendant No.4 was a party to any fraud or was acting in collusion with any other party. The defendant No.4 deposited in its account the cheque drawn by defendant No.1 and after it was given credit for the said amount it withdrew it from its account. If by mistake or otherwise the cheques did not reach the Sagrampura Branch and were not debited in the account of defendant No.1, one fails to understand how the defendant No.4 can be held responsible for it. The learned Judge has placed reliance on Section 37 of the Negotiable Instruments Act but, in my opinion, in the facts and circumstances of the case, the provision of the said section is not attracted. The learned trial Judge was, therefore, not justified in holding that the defendant No.4 was liable to pay the amount which, because of the mistake committed by the bank, was not debited in the account of defendant No.1. First Appeal No.856 and 857 of 1980 filed by the defendant No.4 have to be allowed.

9. As far as First Appeal No.44 and 45 of 1981 are concerned, the appellant's defence was that he was not a partner of defendant No.1. The cheques were drawn by defendant No.1 in favour of defendant No.4 and the defendant No.4 was given credit and was allowed to withdraw the said amount. In the circumstances the defendant No.1 is certainly liable to pay the said amount to the bank if, by mistake, it was not debited in his account. However, the defendant No.3 says that he was

not a partner of defendant No.1. Mrs. Ketty A. Mehta, learned advocate appearing for the appellant submitted that no partnership deed had been produced. According to her, the appellant had produced documents to show that he was merely acting as an agent of defendant No.1 and was not its partner. He had never done any transaction with the bank. The bank produced the account card of the defendant No.1 which bore specimen signature of the defendant No.2 as partner of defendant No.1. The learned advocate for the appellant contended that the officer of the bank who had been examined as a witness had not identified the said signature. However, the bank produced two other cards Exhs.85 and 86 of another firm from Bank of Commerce which bore similar signature of defendant No.2. The defendant No.2 has admitted his signature on Exhs.85 and 86. The learned Judge on comparing the admitted signature of defendant No.2 of Exhs.85 and 86 with his disputed signature on Exh.77 came to the conclusion that the signature on Exh.77 is the signature of defendant No.2. The learned advocate for the appellant contended that the appellant had examined an independent witness Shri Yashvantbhai Modi, Exh. 64, to show that the defendant No.2 was acting as an agent of the firm at Bombay and that he was not a partner. However, the finding recorded by the learned trial Judge that Exh.77 bore signature of defendant No.2 is wholly justified and the said Exh.77 shows that the account was opened in the name of defendant No.1 as a partnership firm and defendant Nos.2 and 3 were shown as the partners. Thus, the defendant No.2 held himself out as a partner while opening the account, and hence, is certainly liable to pay the amount in question. There is no substance in the appeals filed by him.

10. The result of the above discussion is that, First Appeal Nos.856 and 857 of 1980 filed by the defendant No.4 succeed and they are allowed. The judgement and decree passed by the learned Judge against defendant No.4 is set aside. No order as to costs.

11. First Appeal Nos.44 and 45 of 1981 filed by the original defendant No.2 fail and are dismissed with costs.

Sd/-
[M.C.PATEL, J]

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'Bhavesh'